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2013 IL App (4th) 120778-U

NO. 4-12-0778

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
October 18, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KENNETH Z. ALLEN,	)	No. 09CF818
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justices Pope and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant failed to establish cause and prejudice, the trial court did not err in denying his motion for leave to file a successive postconviction petition.

¶ 2 In February 2010, defendant, Kenneth Z. Allen, pleaded guilty to one count of second degree murder, and the trial court sentenced him to 18 years in prison. In May 2010, defendant filed an amended motion to withdraw guilty plea and vacate sentence, which the court denied. In October 2010, defendant filed a postconviction petition, which the court dismissed as frivolous and patently without merit. This court affirmed. In February 2012, defendant filed a motion for leave to file a successive postconviction petition, which the trial court denied.

¶ 3 On appeal, defendant argues the trial court erred in denying him leave to file a successive postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2009, the State charged defendant by information with two counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), alleging he, without legal justification and with the intent to kill or do great bodily harm to Kenneth Nolan, personally discharged a firearm in Nolan's direction, thereby causing his death. The State later charged defendant with one count of second degree murder (720 ILCS 5/9-2(a)(2) (West 2008)), alleging he knowingly killed Nolan by shooting him with a gun, and at the time of the killing he unreasonably believed the circumstances to be such that, if they existed, would justify the killing.

¶ 6 In February 2010, defendant pleaded guilty to second degree murder. At the guilty-plea hearing, defendant indicated he understood the sentencing range was between 4 and 20 years for the Class 1 felony. As part of the plea agreement, the State agreed to dismiss the two counts of first degree murder and recommend an 18-year sentence. Defendant indicated that was his understanding of the agreement. He also stated he had an opportunity to discuss his plea with his attorney and he was not threatened, intimidated, or forced to plead guilty.

¶ 7 According to the State's factual basis, defendant approached the victim at an intersection in Urbana. He then shot Nolan, causing his death. The State indicated defendant believed he was acting in self-defense at the time of the shooting but his belief was unreasonable.

¶ 8 The trial court found defendant's guilty plea to be knowing and voluntary. The court concurred in the State's sentencing recommendation and sentenced defendant to 18 years in prison. The court also dismissed the first-degree-murder counts.

¶ 9 In March 2010, defendant sent a letter to the trial court, indicating he would like to appeal his sentence. The court treated the letter as a motion to withdraw guilty plea and appointed counsel to represent defendant.

¶ 10 In May 2010, appointed counsel filed an amended motion to withdraw guilty plea and vacate sentence. Therein, defendant claimed his prior attorney led him to believe the maximum penalty for second degree murder was 15 years, counsel did not properly investigate potential defenses and interview witnesses, and defendant did not knowingly and voluntarily enter his plea.

¶ 11 In June 2010, defendant filed two *pro se* letters with the trial court. In one letter, he claimed he was not aware of what was going on at the plea hearing or the consequences of his actions. He stated he had a learning disability and "a mental disturbed problem."

¶ 12 In July 2010, the trial court conducted a hearing on the amended motion to withdraw guilty plea and vacate sentence. Defendant testified he has a learning disability. At some point in time, he had a psychological evaluation and had been involuntarily committed for wanting to hurt himself. He was prescribed Paxil, then Haldol, and then a drug he could not remember. He claimed to have been placed on medication in the seventh grade, but he stated he was not current on his medications when he pleaded guilty.

¶ 13 On cross-examination, defendant stated he was not on any medication in prison for any diagnosed mental disorders, although a doctor at a Chicago hospital prescribed him medication in 2008. He stated he had been in segregation since he entered prison because he was "not functioning right."

¶ 14 George Vargas, defendant's attorney at the guilty-plea hearing, testified he met with defendant periodically before trial and never had any reason to believe he did not understand what was being discussed. Defendant did not mention receiving any mental-health treatment in the past or that he was taking medication for his mental health. Vargas stated plea negotiations

picked up near the time of trial, and defendant asked him to request a 15-year sentence for a plea to second degree murder. The State responded with a counteroffer of 20 years. Immediately prior to jury selection, the State offered an 18-year-sentence recommendation. Defendant talked to his family on the phone and then agreed to accept the State's offer.

¶ 15 The trial court denied the motion. The court found defense counsel explored possible defenses and interviewed witnesses. Further, the court stated the evidence did not indicate Vargas demanded defendant to accept the plea. The court also stated nothing at the guilty-plea hearing led the court to believe defendant did not understand what he was doing or the consequences of his actions. Defendant filed a timely notice of appeal (No. 4-10-0508).

¶ 16 In October 2010, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2010)). Defendant alleged his due-process rights were violated at the hearing on the motion to withdraw guilty plea when improper impeachment evidence was introduced through the testimony of Attorney Vargas and when Vargas violated the attorney-client privilege. Defendant also claimed due process was denied during the hearing when appointed counsel failed to call witnesses who could have testified to his medical condition and to how his prescribed medication affected his ability to comprehend.

¶ 17 In December 2010, the trial court dismissed the petition as frivolous and patently without merit. The court noted, in part, that defendant did not identify any witnesses who could testify to his medical condition or medications and did not attach any exhibits to his petition that would substantiate the existence of any witness or the testimony that witness might have to offer. This court granted defendant leave to file a late notice of appeal (No. 4-11-0140) and consoli-

dated the appeals.

¶ 18 On appeal, defendant argued the trial court erred in summarily dismissing his postconviction petition, claiming he stated the gist of a claim that counsel was ineffective at the hearing on the motion to withdraw for failing to call witnesses to describe how his psychiatric condition and absence of medication affected his ability to understand the nature and consequences of his guilty plea. *People v. Allen*, 2011 IL App (4th) 100508-U, ¶ 23. This court found as follows:

"In his petition, defendant's only support for the claim was his testimony at the hearing on the motion to withdraw, where he stated he had previously had a psychological evaluation, had taken Paxil and Haldol, and was unable to work because of a disability. However, defendant's testimony does not specify the time period when he had psychological problems or when or how long he took Paxil and Haldol. In contrast to the defendant in [*People v. Brown*, 236 Ill. 2d 175, 923 N.E.2d 748 (2010)], he did not attach any affidavits of witnesses he might have called to testify to his condition or include any of his medical records. He also did not explain the absence of any documents that could have corroborated his allegations. Defendant did not allege any of these circumstances impacted the validity of his plea.

Even taking the allegations of the petition as true and liberally construing them [citation], defendant must still plead

specific facts to support his claim [citation]. Here, however, defendant's unsupported and speculative allegations require too great a leap to find he asserted a constitutional claim. Nothing indicates defendant was on psychotropic medication, to his detriment, at the time of the plea hearing or that he needed the medication, for his benefit, to understand the proceedings. Thus, he failed to clearly set forth the respects in which his constitutional rights were violated. We conclude the petition was properly found to be frivolous and patently without merit for the lack of an arguable factual basis." *Allen*, 2011 IL App (4th) 100508-U, ¶¶ 27-28.

¶ 19 In February 2012, defendant filed a motion for leave to file a successive postconviction petition. Defendant alleged ineffective assistance of counsel at the motion-to-withdraw-guilty-plea stage based on counsel's "failure to investigate and produce defendant's medical records to show proof, cause and prejudice, that defendant's guilty plea was not knowing and voluntary due to his mental incompetence and psychiatric problems."

¶ 20 Defendant attached two medical reports to his motion. Based on an examination in February 1999, Dr. Kenneth Levitan determined that defendant, who acknowledged having five or six past psychiatric hospitalizations, had "conduct disorder, rule out mixed personality disorder with borderline and sociopathic features." In August 2004, Dr. William Conroy concluded defendant had "major depression and mental retardation[, along with] significant learning difficulties as well as a personality disorder with some sociopathic features." Conroy indicated "there has been no medical improvement."

¶ 21 In March 2012, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding he "has not identified any impediment which prevented him from procuring the medical records which he now wants the Court to consider and attaching them as exhibits to his initial post-conviction petition." This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues fundamental fairness requires reversal of the trial court's denial of leave to file his successive postconviction petition because it states the gist of nonfrivolous claims and the proceeding on his initial petition was fundamentally deficient so as to satisfy the cause-and-prejudice test.

¶ 24 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Moreover, "a ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 25 The Act "generally contemplates the filing of only one postconviction petition."

*People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). "However, the statutory bar to a successive postconviction petition will be relaxed when fundamental fairness so requires."

*People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003).

¶ 26 A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2010). "Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010). "[A] successive petition 'is not considered "filed" for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test.' " *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 19, 966 N.E.2d 417 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734 (2010)). Both prongs of the cause-and-prejudice test must be satisfied for a defendant to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909; see also *Lee*, 207 Ill. 2d at 5, 796 N.E.2d at 1023 (stating to establish fundamental fairness, "the defendant must show both cause and prejudice with respect to each claim presented").

¶ 27 "While the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim—that is, a claim of arguable merit—the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26, 988 N.E.2d 1051.

"To show cause, a defendant must identify 'an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' [Citation.] To show preju-



dice, a defendant must demonstrate 'that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.' [Citation.]" *People v. Evans*, 2013 IL 113471, ¶ 10, 989 N.E.2d 1096.

"Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009). As the trial court did not engage in any fact finding here, our review is *de novo*. *People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101.

¶ 28 In the case *sub judice*, the question before this court is whether defendant's *pro se* motion for leave to file a successive postconviction petition satisfied the cause-and-prejudice test to warrant granting leave. We find it did not.

¶ 29 In his motion for leave to file a successive postconviction petition, defendant alleged counsel at the hearing on the motion to withdraw guilty plea, appellate counsel, and postconviction counsel were ineffective for failing to investigate and produce defendant's medical records "to show proof, cause and prejudice, that defendant's guilty plea was not knowing and voluntary due to his mental incompetence and psychiatric problems." Defendant also alleged medical records showed a due-process violation when his guilty plea was not knowing and voluntary due to his mental incompetence and psychiatric problems.

¶ 30 Here, defendant failed to show sufficient cause, *i.e.*, "an objective factor that impeded his \*\*\* ability to raise a specific claim during his \*\*\* initial post-conviction proceed-

ings." See 725 ILCS 5/122-1(f) (West 2010). Defendant did not have counsel at his initial postconviction proceedings in the trial court. Moreover, counsel at the hearing on the motion to withdraw guilty plea and appellate counsel did not impede his ability to file his *pro se* postconviction petition. Instead, it was defendant himself, acting *pro se*, who had the duty to provide the necessary documentation to support his claim or explain its absence. On appeal from his dismissal of the initial postconviction petition, appellate counsel could not argue a claim for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004). Moreover, no ruling on the initial postconviction petition by the trial court or this court could have impeded defendant's ability to raise his claim. As the motion for leave alleged no objective factor that impeded defendant's ability to attach to his initial *pro se* petition the documentation he attaches to the motion for leave, defendant failed to satisfy the cause prong of the cause-and-prejudice test.

¶ 31 Defendant also failed to satisfy the prejudice prong. Defendant pleaded guilty on February 1, 2010. The most recent of the medical records attached to the motion for leave is what appears to be a portion of a July 31, 2006, evaluation by psychiatrist Mahim Vora, wherein it states "[b]ased on the claimant's calculation he is not capable of handling his own monies." Also included was Dr. Conroy's August 2, 2004, findings that defendant "had major depression and mental retardation," "significant learning difficulties as well as a personality disorder with some sociopathic features," "has hallucinations and has been diagnosed with schizoaffective disorder." The earliest records are dated November and December 1993, when defendant was 13 years old.

¶ 32 Defendant's claim that his guilty plea was not knowing and voluntary due to his

"mental incompetence and psychiatric problems" failed to establish a violation of due process.

Defendant's current motion and supporting documentation do not even raise a *bona fide* doubt of his fitness to plead guilty. Instead, they show at most his mental condition years before his guilty plea. Moreover, the record of the guilty-plea hearing contradicts his claim he did not understand the nature of the proceedings or was unable to assist in his defense.

¶ 33 As defendant failed to satisfy both prongs of the cause-and-prejudice test, we need not address defendant's claim that recent opinions from the United States Supreme Court excuse him from having to show cause for failing to properly raise his ineffectiveness claim in his first petition. See *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); see also *People v. Sutherland*, 2013 IL App (1st) 113072, ¶¶ 17-20 (discussing and distinguishing *Trevino* and *Martinez*); *Miller*, 2013 IL App (1st) 111147, ¶ 41, 988 N.E.2d 1051 (declining to apply *Martinez*). Here, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding he failed to satisfy the requirements of section 122-1(f). We agree, and find no error. As such, we will not consider the merits of defendant's claim. See *People v. Spivey*, 377 Ill. App. 3d 146, 150, 879 N.E.2d 391, 395-96 (2007).

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed.